INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	4
Conclusion	8
Appendix	9

CITATIONS

Cases:

Baruch v. *Commissioner*, 178 F. 2d 402	5
Bergstein v. *Commissioner*, decided February 7, 1949	5
Dalton v. *Bowers*, 287 U. S. 404	7
Dehail v. *United States*, decided September 13, 1949	5
Foreman v. *Harrison*, 79 F. Supp. 987	5
Higgins v. *Commissioner*, 312 U. S. 212	7
Lazier v. *United States*, 170 F. 2d 521	7
Pettit v. *Commissioner*, 175 F. 2d 195	5
Reo Motors, Inc. v. *Commissioner*, No. 59, this Term	4, 6
Schamberg v. *Commissioner*, decided June 27, 1949	5
Washburn v. *Commissioner*, 51 F. 2d 949	7

Statutes:

Internal Revenue Code:	
Sec. 23 (26 U.S.C. 1946 ed., Sec. 23)	9
Sec. 117 (26 U.S.C. 1946 ed., Sec. 117)	9
Sec. 122 (26 U.S.C. 1946 ed., Sec. 122)	4, 6, 10
Revenue Act of 1918, c. 18, 40 Stat. 1057, Sec. 204	6
Revenue Act of 1921, c. 136, 42 Stat. 227, Sec. 204	6
Revenue Act of 1924, c. 234, 43 Stat. 253, Sec. 206	6
Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 206	6
Revenue Act of 1928, c. 852, 45 Stat. 791, Sec. 117	6
Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 117	6

Miscellaneous:

I. T. 3711, 1945 Cum. Bull. 162	5

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 553

JOSEPH SIC, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 10-15) is reported at 10 T. C. 1096. The opinion of the Court of Appeals (R. 27-30) is reported at 177 F. 2d 469.

JURISDICTION

The judgment of the Court of Appeals was entered October 28, 1949. (R. 30.) A petition for rehearing was denied November 18, 1949. (R. 32.) The petition for writ of certiorari was filed January 23, 1950. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Is the loss sustained by a farmer from the sale of part of his farming lands a loss "attributable to the operation of a trade or business regularly carried on by the taxpayer", which may be allowed in computing the net operating loss for that year, within the meaning of Section 122 of the Internal Revenue Code (governing net operating loss carry-overs and carry-backs)?

STATUTES INVOLVED

These appear in the Appendix, *infra*, pp. 9-13.

STATEMENT

The pertinent facts were stipulated as follows:

Taxpayer is a retired farmer, residing in Fremont, Nebraska. He filed a return for the taxable year in question (1943) with the Collector at Omaha. (R. 11.)

During the calendar years 1942 and 1943, and at all times material herein, taxpayer lived on a farm and was engaged in the occupation of farming. In 1919, taxpayer purchased an unimproved farm —unimproved in the sense that it had no building on it. He retained possession and individually cultivated the farm from 1919 to 1942 in the course of his activities as a farmer. But on January 7, 1942, taxpayer sold the unimproved farm, with a resultant loss of $15,300. (R. 11.)

Exclusive of any net operating loss deduction allowance, taxpayer's net income for the years 1941 to 1943 was as follows (R. 11):

1941 income	$ 2,240.00
1942 loss	$ 5,636.93
1943 income	$10,403.66

The net loss for the year 1942 was made up of the following items (R. 11):

Loss from sale of farm	$15,300.00
Personal taxes	32.00
	$15,332.00
Less—Net income from farming	9,695.07
	$ 5,636.93

The net incomes indicated above for the years 1941 and 1943 represent net income from farming only. It was stipulated that if the loss of $15,300 attributable to the sale of the farm in 1942 was, under Section 122 (d)(5) of the Internal Revenue Code, a net operating loss "attributable to the operation of a trade or business regularly carried on by the taxpayer", then taxpayer is entitled to a net operating loss carry-over to, and deduction in, the year 1943 of $3,364.93. (R. 12.)

On June 10, 1948, the Tax Court decided that the loss from the sale of taxpayer's farm was not attributable to the operation of a business regularly carried on by the taxpayer, within the meaning of Section 122 (d)(5) of the Internal Revenue Code, and that the loss could therefore not be included in computing net operating loss for 1942, to be carried over and deducted in 1943. (R. 10-15.)

Taxpayer thereupon petitioned for review in the United States Court of Appeals for the Eighth Circuit (R. 15-17), which affirmed (R. 27-30).

ARGUMENT

1. The single question is whether taxpayer, a farmer, is entitled to treat a loss on the sale of land used in that business as a net operating loss within the meaning of Section 122 of the Internal Revenue Code—the provision governing net operating loss carry-overs and carry-backs. Cf. *Reo Motors, Inc.* v. *Commissioner,* No. 59, decided January 9, 1950. In computing the net operating loss of a non-corporate taxpayer for a given year, Sections 122(a) and (d)(5) drastically limit the allowance of deductible losses "not attributable to the operation of a trade or business regularly carried on by the taxpayer" (Appendix, *infra,* p. 13). The Tax Court and the Court of Appeals have held that because taxpayer was engaged in farming and not in the business of buying and selling farm land or real estate, his loss from the sale was not attributable to the operation of a trade or business regularly carried on by him, and therefore could not be allowed in computing his net operating loss for the year of the sale.[1]

---

[1] Section 122(d)(5) restricts the allowance of otherwise allowable deductions which are not attributable to the operation of a trade or business to the extent of the taxpayer's gross income not derived from such a business. *Infra,* p. 13. Taxpayer here had no income not derived from farming (*supra,* p. 3), and the loss on the sale was therefore disallowed in full for the purposes of computing net operating loss to be carried over to succeeding years.

This holding is in full accord with all the other authority on this particular problem, including the decisions of two other Courts of Appeals, District Courts in two additional circuits, and the Tax Court in other cases. *Baruch* v. *Commissioner,* 178 F. 2d 402 (C. A. 2); *Pettit* v. *Commissioner,* 175 F. 2d 195 (C. A. 5); *Foreman* v. *Harrison,* 79 F. Supp. 987 (N. D. Ill.); *Dehail* v. *United States* (S. D. Calif.), decided September 13, 1949 (1949 C. C. H., par. 9494); *Bergstein* v. *Commissioner,* T. C., decided February 7, 1949 (1949 P.-H. T. C. Memorandum Decisions, par. 49,022); *Schamberg* v. *Commissioner,* T. C., decided June 27, 1949 (1949 P.-H. T. C. Memorandum Decisions, par. 49,162); I. T. 3711, 1945 Cum. Bull. 162. This uniform series of recent decisions properly construes the statutory provision, which speaks of deductions "not attributable to the *operation* of a trade or business" (italics supplied). Taxpayer's argument would read the word "operation" out of the statute. The sale of his farm land was not an incident of the "operation" of a farming business, in which he was engaged, but, if it were incident to the operation of any business at all, would be attributable to the operation of the business of buying and selling real estate, in which he was not occupied.

The decision below is also supported by the legislative history of the carry-over provisions. The Revenue Acts of 1918 and 1921, both of which permitted a net loss carry-over, expressly provided that a sale of assets used in the taxpayer's busi-

ness was within the definition of a net loss which could be carried forward.[2] The 1924 Act's carry-over section omitted this specific provision and simply referred to "deductions otherwise allowed by law not attributable to the operation of a trade or business regularly carried on by the taxpayer." Revenue Act of 1924, Section 206(a)(1), 43 Stat. 253, 260. The Revenue Acts of 1926, 1928, and 1932 followed suit,[3] and Section 122 of the Code (which was generally modelled on the 1924, 1926, 1928, and 1932 statutes, *Reo Motors Inc.* v. *Commissioner,* No. 59, this Term (slip opinion, p. 7)), adopted the same language. The pronounced difference between the 1918 and 1921 provisions, on the one hand, and all the later statutes, on the other, indicates that from 1924 Congress intended to exclude losses on sales of assets used in a business from the conception of deductions attributable to the *operation* of that trade or business, except where the business is one of selling such assets.

---

[2] Section 204 of the Revenue Act of 1918, 40 Stat. 1057, defined a "net loss" as one "resulting from either (1) the operation of any business regularly carried on by the taxpayer, or (2) the bona fide sale by the taxpayer of plant, buildings, machinery, equipment or other facilities * * *." The corresponding section (Section 204) of the Revenue Act of 1921, 42 Stat. 227, defined a "net loss" as "only net losses resulting from the operation of any trade or business regularly carried on by the taxpayer (including losses sustained from the sale or other disposition of real estate, machinery, and other capital assets, used in the conduct of such trade or business) * * *."

[3] Revenue Act of 1926, Section 206(a)(1), 44 Stat. 9, 17; Revenue Act of 1928, Section 117(a)(1), 45 Stat. 791, 825; Revenue Act of 1932, Section 117(a)(1), 47 Stat. 169, 207.

2. Taxpayer asserts that the instant holding is contrary to the earlier decision of the court below in *Washburn* v. *Commissioner,* 51 F. 2d 949 (C. A. 8) (Pet. 5). As pointed out below (R. 29), that case arose under the Revenue Act of 1921, the provisions of which differ radically, as we have just pointed out, from those of Section 122 of the Code. Moreover, the decision in the *Washburn* case is of doubtful correctness in view of this Court's later decision in *Higgins* v. *Commissioner,* 312 U. S. 212, and in any event the holdings of the court below in *Lazier* v. *United States,* 170 F. 2d 521, and in the present case, represent the now settled views of that court.

In a roundabout way, taxpayer also suggests (Pet. 5-6, Br. 13) that the decision below is inconsistent with a ruling by this Court which arose under the carry-over section of the 1924 Act. *Dalton* v. *Bowers,* 287 U. S. 404. On the contrary, we believe the decision below and the line of authority in accord with it, to be consistent with, and supported by, the *Dalton* case. There an inventor, in order to market his inventions, formed a corporation. Upon a sale of the corporation's stock, he suffered a loss, which he claimed could be carried-over as a loss suffered in the operation of his business. This was not shown, the Court held, because the taxpayer "was not regularly engaged in the business of buying and selling corporate stocks" (287 U. S. at 409). Similarly, here the taxpayer was

regularly engaged in farming, and not in the business of buying and selling real property.

CONCLUSION

The decision below is correct, and there is a concord, rather than a conflict, of circuits. There is no occasion for further review. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
THERON LAMAR CAUDLE,
Assistant Attorney General.
ELLIS N. SLACK,
LEE A. JACKSON,
EDWARD J. P. ZIMMERMAN,
Special Assistants to the Attorney General.

FEBRUARY 1950.

APPENDIX

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(s) (As added by Section 211 (a) of the Revenue Act of 1939, c. 247, 53 Stat. 862) *Net Operating Loss Deduction.*—For any taxable year beginning after December 31, 1939, the net operating loss deduction computed under section 122.

* * * * *

(26 U. S. C. 1946 ed., Sec. 23.)

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) (As amended by the Revenue Act of 1941, c. 412, 55 Stat. 687, Sec. 115 (b) and the Revenue Act of 1942, c. 619, 56 Stat. 798, Sec. 151 (a)) *Definitions.*—As used in this chapter—

(1) *Capital Assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to

the allowance for depreciation provided in section 23 (l), or an obligation of the United States or any of its possessions, or of a State or Territory, or any political subdivision thereof, or of the District of Columbia, issued on or after March 1, 1941, on a discount basis and payable without interest at a fixed maturity date not exceeding one year from the date of issue, or real property used in the trade or business of the taxpayer.

* * * * *

(26 U. S. C. 1946 ed., Sec. 117.)

SEC. 122 (As added by the Revenue Act of 1939, *supra,* Sec. 211(b)). NET OPERATION LOSS DEDUCTION.

(a) (As amended by the Revenue Act of 1942, c. 619, 56 Stat. 798, Sec. 105 (e)(3)(A)) *Definition of Net Operating Loss.*—As used in this section, the term "net operating loss" means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d).

(b) (As amended by the Revenue Act of 1942, *supra,* Sec. 153 (a)) *Amount of Carry-Back and Carry-Over.*—

(1) *Net Operating Loss Carry-Back.*—If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years, except

that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the second preceding taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d)(1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such second preceding taxable year without regard to such net operating loss.

(2) *Net Operating Loss Carry-Over.*—If for any taxable year the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-over for each of the two succeeding taxable years, except that the carry-over in the case of the second succeeding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the intervening taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such intervening taxable year without regard to such net operating loss and without regard to any net operating loss carry-back. For the purposes of the preceding sentence, the net operating loss for any taxable year beginning after December 31, 1941 shall be reduced by the sum of the net income for each of the two preceding taxable years (computed for each such preceding taxable year with the exceptions,

additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and computed by determining the net operating loss deduction without regard to such net operating loss or to the net operating loss for the succeeding taxable year).

(c) (As amended by the Revenue Act of 1942, *supra*, Secs. 105 (e)(3)(B) and 153 (b)) *Amount of Net Operating Loss Deduction.*—The amount of the net operating loss deduction shall be the aggregate of the net operating loss carry-overs and of the net operating loss carry-backs to the taxable year reduced by the amount, if any, by which the net income (computed with the exceptions and limitations provided in subsection (d) (1), (2), (3), and (4)) exceeds, in the case of a taxpayer other than a corporation, the net income (computed without such deduction), or, in the case of a corporation, the normal-tax net income (computed without such deduction and without the credit provided in section 26 (e)).

(d) (As amended by the Revenue Act of 1942, *supra*, Secs. 105 (e)(3)(C) and 150 (e)) *Exceptions, Additions, and Limitations.*—The exceptions, additions, and limitations referred to in subsections (a), (b), and (c) shall be as follows:

(1) The deduction for depletion shall not exceed the amount which would be allowable if computed without reference to discovery value or to percentage depletion under section 114 (b)(2), (3), or (4);

(2) There shall be included in computing gross income the amount of interest received which is wholly exempt from the taxes imposed by this chapter, decreased by the amount of interest paid or accrued which is not allowed as a deduction by section 23 (b), relating to interest on indebtedness incurred or continued to purchase or carry certain tax-exempt obligations;

(3) No net operating loss deduction shall be allowed;

(4) Gains and losses from sales or exchanges of capital assets shall be taken into account without regard to the provisions of section 117 (b). As so computed the amount deductible on account of such losses shall not exceed the amount includible on account of such gains.

(5) Deductions otherwise allowed by law not attributable to the operation of a trade or business regularly carried on by the taxpayer shall (in the case of a taxpayer other than a corporation) be allowed only to the extent of the amount of the gross income not derived from such trade or business. For the purposes of this paragraph deductions and gross income shall be computed with the exceptions and limitations specified in paragraphs (1) to (4) of this subsection.

* * * * *

(26 U. S. C. 1946 ed., Sec. 122.)

☆ U. S. GOVERNMENT PRINTING OFFICE: 1950 878061 804